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Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 74

HENRY J. MILLS and
OSMOND J. LITOLFF,
Petitioners

versus

STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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versus

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Henry J. Mills and Osmond J. Litolff, petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, dated March 3, 1958, entered in the case of State of Louisiana vs. Henry J. Mills and Osmond J. Litolff, No. 43939 of the docket of the Supreme Court of Louisiana, rejecting and denying the application of the said Henry J. Mills and Osmond J. Litolff, petitioners, for writs or certiorari, mandamus and prohibition, to review the judgment of Honorable J. Bernard Cocke, Judge of Section E, Criminal District Court

for the Parish of Orleans, State of Louisiana, adjudging and finding the said Henry J. Mills and Osmond J. Litolff, petitioners, guilty of contempt of court and sentencing each of said petitioners to pay a fine of $100 and to serve ten days in the Parish prison of the City of New Orleans, and in default of the payment of said fine, sentencing each of said petitioners to serve ten days additional in said Parish prison of the City of New Orleans.

The said judgment of the Supreme Court of the State of Louisiana rejecting and denying the application of the said Henry J. Mills and the said Osmond J. Litolff, for the above mentioned writs, is a final judgment, no application for a rehearing being permitted under the Rules of the said Supreme Court of Louisiana when the said Court has refused to grant a writ of certiorari or review, or in the alternative, a writ of mandamus or prohibition or rule nisi. (Sec. 5, RXII, Rules La. Supreme Court) (See certified copy of said rules attached to typewritten record of said case filed with this application).

The said Supreme Court of Louisiana is the highest court of the State of Louisiana and petitioners, Henry J. Mills and Osmond J. Litolff have exhausted all legal remedies possible in the Courts of the State of Louisiana.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana rejecting and denying petitioners' application for writs of certiorari, mandamus and prohibition has not been published in any official or unofficial report.

The written opinion of the Supreme Court of Louisiana, denying petitioners' application for the aforesaid writs, as recorded in the minutes of the Court, will be found on page 97 of the typewritten record of the Supreme Court of Louisiana, which accompanies this petition, duly certified as true and correct.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, Sec. 1257 (3) which provides, in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes of * * * the United States".

Petitioners respectfully contend that they have been denied rights, privileges and immunities guaranteed petitioners by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

QUESTIONS PRESENTED FOR REVIEW

The Supreme Court of Louisiana erred in refusing to issue the writs of mandamus and prohibition prayed for and in failing to annul and set aside the judgments and senten-

ces for contempt against petitioners, and in failing to hold that petitioners were legally justified in claiming their privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States of America, when called as witnesses before the Grand Jury of the Parish of Orleans, because:

(a) In answering such questions, such answers would incriminate them or tend to incriminate them, or would afford a link in a chain of evidence which would become the basis of subsequent prosecutions under the laws of the United States of America, or which could lead to the discovery of evidence which could be made the basis of criminal prosecutions against petitioners for violating the income tax law (and other Statutes) of the United States of America,

and further, because:

(b) The District Attorney of the Parish of Orleans, who is the legal adviser of the Grand Jury for the Parish of Orleans, and who was the officer who would interrogate witnesses appearing before the said Grand Jury, *in the stipulation entered into* by and between the said District Attorney and Eugene Stanley, attorney for petitioners, *agreed and stipulated*, among other things, *that certain facts should be considered as evidence* herein in lieu of the taking of testimony on the hearing of the rule for contempt, *and among the said facts to be*

considered as evidence without the necessity of taking formal testimony thereon (see par. 7 of Stipulation "C" regarding petitioner Osmond J. Litolff, page 53 of the printed record of the Supreme Court of Louisiana, and see par. 7 of the Stipulation as to petitioner Henry J. Mills, page 46 of the printed record of the Supreme Court of the State of Louisiana) *was the fact that there existed and did exist at the time the said Grand Jury hearing was being held co-operation and collaboration between the District Attorney for the Parish of Orleans, Hon. Leon D. Hubert, Jr., and the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service of the United States of America, in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion and that Hon. Leon D. Hubert, Jr., District Attorney for the Parish of Orleans, had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasions, felonies under the laws of the United States of America and the State of Louisiana.*

Further that petitioners were then under investigation by agents of the United States Department of Internal Revenue and other United States officials concerning petitioners' income tax returns for the years 1948 to 1951.

inclusive, and petitioners had been required by the investigating officers of the United States to sign waivers against prescription of, and concerning petitioners' income tax returns for the years 1948 to 1951, inclusive, so as to afford such investigating officers of the United States Internal Revenue Service and other officials of the United States Government an opportunity to proceed against petitioners for any violation of the income tax laws or other federal statutes which said investigating officers would claim petitioners had violated, the statutory period of limitation on criminal prosecutions for offenses under the United States Internal Revenue laws (six years) (U. S. Code Title 26-6531) not having elapsed regarding petitioners' income tax returns.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States reading in part, as follows:

"* * * nor shall he be compelled in any criminal case to be a witness against himself" (U. S. Constitution, Amendment V) and

"* * * nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (U.S. Constitution, Amendment XIV).

STATEMENT OF THE CASE

Petitioners, Henry J. Mills and Osmond J. Litolff, on January 22, 1958, were subpoenaed as witnesses before the Grand Jury of the Parish of Orleans and an attempt was made by the District Attorney for the Parish of Orleans to interrogate petitioners, under oath, regarding the current political bribery and income tax evasion by members of the New Orleans Police Department, and others, and petitioners, at that time, on advice of counsel, refused to answer such questions, claiming their constitutional right against self-incrimination under the Constitution of the State of Louisiana (Section 11 of Article One and Section 13 of Article 19) and under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Petitioners, in refusing to answer such questions, expressed a fear of federal prosecution under the income tax laws of the United States and other federal laws, all felonies, invoking the constitutional provisions above mentioned, because to answer such questions would incriminate, or tend to incriminate them, or would afford a link in a chain of evidence which could become the basis of subsequent prosecutions under the laws of the United States of America, or could lead to the discovery of evidence which could be made the basis of criminal prosecutions against petitioners for violating the laws of the State of Louisiana, and/or the laws of the United States of America, etc.

Petitioners contended they were in actual and immediate danger of prosecution by the United States of America, under the income tax law and other federal laws, all felonies,

because they were under investigation by the investigating officers of the United States Internal Revenue Department and other United States officials concerning petitioners' income tax returns for the years 1948 to 1951, inclusive. (See typewritten certified copy of record of Louisiana Supreme Court-Stipulation — page 43 to 46 as to petitioner, Henry J. Mills, and stipulation — pages 51 to 54 as to petitioner, Osmond J. Litolff).

Photostatic copies of the waivers signed by petitioner, Osmond J. Litolff, and his wife, for the above years, will be found on pages 71 to 74, inclusive, of the typewritten record of the Louisiana Supreme Court, and photostatic copies of the waivers as to petitioner, Henry Mills, signed by the said Henry Mills and his wife, will be found on pages 75 to 78, inclusive, of the typewritten record of the Louisiana Supreme Court, and a letter from the United States Treasury Department, Internal Revenue Service, to petitioner Henry Mills and his wife, acknowledging receipt of the consent waivers above mentioned, will be found on page 79 of the typewritten record of the Louisiana Supreme Court.

The reasons of the Trial Judge for refusing to uphold petitioners' claim against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution will be found on pages 82 to 89 of the typewritten record of the Louisiana Supreme Court, a certified copy of which accompanies this application.

The judgment of the trial judge finding petitioners guilty of contempt of court and sentencing each of petitioners to pay a fine of $100 and to serve ten days in the Parish Prison of the City of New Orleans and in default of the payment

of said fine to serve ten days additional in the said Parish prison, will be found on page 94 and 95 of the typewritten record of the Louisiana Supreme Court, a certified copy of which accompanies this application.

Petitioners, after having given due notice to the trial Judge and the District Attorney (see typewritten record of the Louisiana Supreme Court, page 81) of petitioners' intention to apply to the Louisiana Supreme Court for writs of certiorari, mandamus and prohibition to review the judgment and sentences finding petitioners guilty of contempt and sentencing them as above set out, filed their application for such writs in the Louisiana Supreme Court.

This application will be found on pages 1 to 22 of the typewritten record of the Louisiana Supreme Court, a certified copy of which accompanies this application.

The judgment of the Louisiana Supreme Court denying petitioners' application, and refusing to issue the writs of certiorari, mandamus and prohibition prayed for, will be found on page 97 of the typewritten record of the Louisiana Supreme Court, a certified copy of which accompanies this application.

Petitioners' application to the Louisiana Supreme Court for a stay of execution, in order to apply to this Honorable Court for a writ of certiorari to the Louisiana Supreme Court will be found on pages 98 to 100 of the typewritten record of the Louisiana Supreme Court, a certified copy of which accompanies this application.

The Order of Hon. John B. Fournet, Chief Justice of the Louisiana Supreme Court, granting petitioners a stay of execution of the mandate of the Louisiana Supreme Court upon petitioners furnishing bond in the sum of $200, (said order being dated March 4, 1958,) will be found on page 101 of the typewritten record of the Louisiana Supreme Court, and the bond required by the said Chief Justice, in the sum of $200, duly approved by the said Chief Justice, will be found on pages 110 and 111 of the said typewritten record of the Supreme Court of Louisiana, a certified copy of which accompanies this application.

This application for a writ of certiorari to the Supreme Court of Louisiana is timely filed.

FEDERAL QUESTIONS IN THE COURTS BELOW

(a) In the Trial Court, and
(b) In the Louisiana Supreme Court

Petitioners claimed, in the above mentioned courts, their right to refuse to answer the said questions, claiming their constitutional immunity against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States, because of fear of federal prosecution under the income tax laws of the United States of America and other federal laws, all felonies under the laws of the United States of America, and claimed that the answering of any such questions might tend to incriminate petitioners, or would afford a link in a chain of evidence which could become the basis of subsequent prosecutions under the laws of the United States of America.

Further, that petitioners were in actual and immediate danger of prosecution by the United States of America, under the income tax laws and other federal statutes, all felonies, and that petitioners were then, and had been, for some time under investigation by the investigating officers of the United States Internal Revenue Service and other United States officials concerning petitioners' income tax returns for the years 1948 to 1951, inclusive; that petitioners had been required by the investigating officers of the United States Internal Revenue Service to sign waivers against prescription of and concerning petitioners' income tax returns for the years 1948 to 1951, inclusive, etc; that the period of limitation on criminal prosecutions for offenses arising under the United States Internal Revenue laws is six years, (USC 26-6531) and that this period of time had not elapsed regarding petitioners' income tax returns; that there has existed, and then existed, co-operation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service for the United States of America and its investigators, as well as with the Police Bureau of the City of New Orleans, in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion, and that Hon. Leon D. Hubert, Jr. District Attorney for the Parish of Orleans, had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police Department, and income tax evasions, felonies under the law of the United States of America and the State of Louisiana.

BASIS OF PETITIONERS' APPLICATION

(Federal Questions Involved)

The Federal questions involved, to-wit, deprivation of rights guaranteed petitioners under the Fifth and Fourteenth Amendments to the United States Constitution, as the record plainly shows, was timely raised in both the trial Court and in the Louisiana Supreme Court.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Supreme Court of Louisiana, the highest Court in the State, has decided a Federal question:

(a) By refusing to exercise its supervisory jurisdiction, through the issuance of the writs of certiorari, etc. applied for, so as to review petitioners' claim that they have been deprived of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, by rejecting petitioners' claim of privilege against self-incrimination, guaranteed petitioners by the said amendments.

The question presented to your Honors is this: Does a witness whose income tax returns are under investigation by the United States Internal Revenue Department — who has been summoned to appear before a State Grand Jury in an investigation into alleged police graft, have the right to refuse to answer such questions pertaining to the said graft investigation, because he fears that such answers may lead to his prosecution under the federal income tax laws, or other federal laws, or because such answers may afford a link in

a chain of evidence which could result in the prosecution of said witness for a violation of the income tax laws or other federal statutes?

The State District Attorney conducting such investigation, admits that there had existed, and at the time of the investigation, still existed, cooperation and collaboration between the said District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators * * * in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion, and the said District Attorney for the Parish of Orleans admitted that he had held conferences with the United States Attorney for the Eastern District of Louisiana, regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasion, felonies under the laws of the United States of America and the State of Louisiana.

ARGUMENT

Petitioners are being required, under criminal penalty, by the Courts of Louisiana, to confess to having committed the corpus of a federal crime, or to deny the same.

The issue raised by petitioners herein is broader than the issue raised by the petitioner, Milton Knapp, against Mitchell D. Schweitzer, Judge of the Court of General Sessions and Frank S. Hogan, District Attorney of the County of New York, in case 189 (October term, 1957) of the docket of the Supreme Court of the United States, now under advisement by this Honorable Court.

In the Knapp case, petitioner contended that to answer the questions propounded before a New York Grand Jury might lead to petitioner's prosecution under the Taft-Hartley Act.

In this case petitioners contend that to answer the questions propounded before the Louisiana Grand Jury would lead to petitioners' prosecution for a violation of the United States income tax laws or other federal laws, all felonies, petitioners actually being under investigation by agents of the United States Internal Revenue Service concerning petitioners' income tax returns for the years 1948 to 1951, inclusive.

Further, it is stipulated in the record that the local District Attorney conducting the investigation into police graft before the State Grand Jury is acting in cooperation with the United States Attorney and agents of the United States Treasury Department in said investigation of violations of the United States income tax laws and other Federal Statutes.

We take the liberty of quoting the following from the brief filed by counsel for petitioner in the case of Milton Knapp against Mitchell D. Schweitzer, Judge of the Court of General Sessions, and Frank S. Hogan, District Attorney of the County of New York, respondents, No. 189 (October Term, 1957) of the docket of this Honorable Court: (Now under advisement)

"There can be no *cavil* about the reality of the Petitioner's jeopardy. The questions, if answered affirmatively, would establish the *corpus* of the federal crime. These are not *penumbral* questions; they raise dark and full blown the shadow of federal criminal conviction. There is here no limitation, and indeed, no possibility of limitation, as there was in *Jack* v. *Kansas*[2] of the questions, or of their incriminating possibilities which would keep them without the *ambit* of the federal criminal law. Nor can the dalliance or official inertia or "sportsmanship" of the federal prosecutor be presumed upon, as in *Jack v. Kansas*, for the record here shows a parallel effort on the part of the Federal Prosecutor concerned and the New York District Attorney to stamp out bribery of union officials. (R. 9, 99)

There is here no geographic remoteness nor extradition safeguard as in *King of Two Sicilies* v. *Willcox*;[3] nor an unimaginable use of a dormant legal weapon, as in *Queen* v. *Boyes*.[4] Nor was the instance court here without knowledge of law of the "other" jurisdiction, as in the *Willcox*[4A] case, for it was bound to take judicial notice of it.

Let it be observed also that Petitioner's testimony, if New York succeeds in extorting it from him, may not merely inspire the federal prosecution, but can, in that federal prosecution, be read against him verbatim.[5] Nor does the fact that New York has granted immunity to this Petitioner

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[2]199 U. S. 372.
[3]7 State Trials, N. S. 1050.
[4]1 B. & S. 311.
[4A]Cf. *U. S.* v. *MacRae*, 3 L. R. Ch. App. 79 explaining and limiting *Willcox*. In the *MacRae* case, the criminating law appeared on the face of the pleadings.
[5]*Feldman* v. *U. S.*, 322 U. S. 487

extinguish or make less remote the possibility of federal prosecution.[5A]

Faced with this tangible, proximate and undiminished peril of federal prosecution, petitioner asserts that he is protected in his refusal to answer by the Fifth Amendment.

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

At the very least, this is a limitation on the Federal Government,[6] and by its terms a limitation on its prosecuting arm. It means, at minimum, that the citizen shall not be compelled

> ". . . in any [federal] criminal case . . ."

to give incriminating testimony. The Amendment is not less than a guaranty to him of safety against federal prosecution inspired by or based upon testimony wrung from him by compulsion.

The primary right conferred by the Amendment is a right to avoid federal prosecution. The right does not exist where the danger apprehended is not a danger of prosecution[7] and the right abates with the danger of prosecution however that may occur; whether by grant of immunity,[8] by pardon,[9] by the running of the statute of limi-

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[5A] *Ibid.*
[6] *Barron* v. *Baltimore*, 7 Pet. 243.
[7] *Ullman* v. *U. S.*, 350 U. S. 422.
[8] *Hale* v. *Henkel*, 201 U. S. 43.
[9] *Brown* v. *Walker*, 161 U. S. 591.

tations[10] or by former jeopardy.[11] But to produce an abatement of the right the abating event must be tailored to fit the danger of prosecution.[12]

The right then, is fundamentally a right to avoid a federal prosecution based upon compelled testimony. Only secondarily is it a right to decline to testify; the right to decline to testify is wholly ancillary to the right to avoid a prosecution stemming from the testimony.

This ancillary right to decline to testify is not confined to criminal prosecution wherein the witness is or is subject to being proceeded against. One need not be a defendant or prospective defendant to assert the right. A witness, as such, may claim the privilege. He may claim it in civil litigation.[13] He may claim it in administrative proceedings.[14] He may claim it before purely inquisitorial bodies such as Congressional Committees.[15] With sound reason, the law fears the creation of a tandem between inquisitor and prosecutor whereby a person may be compelled to feed the prosecutor to his own damnation.

It may thus safely be said that the right to decline to testify is independent of the function of the inquisitor. Be the function the adjustment of private rights, the restraint of the criminal, the dispatch of public business, the framing of new laws, it is all one so far as the Amendment is concerned — and all immaterial. The right is dependent on the

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[10] *Ibid.*
[11] *Ibid.*
[12] *Counselman v. Hitchcock*, 142 U. S. 547.
[13] *McCarthy* v. *Arndstein*, 266 U. S. 34.
[14] *Vajtauer* v. *Commissioner*, 273 U. S. 103.
[15] *Quinn* v. *U. S.*, 349 U. S. 155.

proximity of prosecution and not upon the color of the inquisitor's robe. It is assertable even where

> ". . . the proceedings give no warrant for thinking [the inquisitorial body is] attempting or intending to try [an individual] at its bar or before its committee for any crime or wrongdoing.[16]

The 'right of silence' is no "brooding omnipresence"; detached from the operations of the Federal Government; it is a definite limitation addressed to the action of a definite group of federal officials whose function is the prosecution of breaches of federal statutes, and wholly dependent upon and ancillary to the possible action of that group of federal officials; it is dependent upon them and not upon the source of the inquisition.

The Petitioner here now asserts the ancillary right of silence in a forum not of the central government's creation, but one bound, none the less, by federal organic law. He asserts that ancillary right of silence for the protection of his primary right to avoid federal prosecution based on compelled testimony.

What power lies in a state court as inquisitor which makes it superior to a Congressional Committee as inquisitor? Is not the same ancillary right involved? Does not the same primary right exist? And is not the ancillary right as federal in its origin as the primary right from which it springs? Is the state court, which has no prosecuting functions in the federal field, not on a par with a

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[16] *McGrain v. Daugherty*, 273 U. S. 135, 179-80

Congressional Committee which has no prosecuting functions? Or is it to be presumed that there is a closer nexus, a clearer channel of information between one arm of the federal government and another than between a state agency and a federal prosecutor, whereby the peril of the witness is increased?

The answer to these questions, say the respondents, is to be found in the so-called "two sovereignties" rule supposedly developed as to the matter of self-incrimination through such cases as *Brown* v. *Walker*,[17] *Jack* v. *Kansas*,[18] *Hale v. Henkel*,[19] *U. S.* v. *Murdock*[20] and *Feldman* v. *U. S.*[21] and recently, in another application (the related field of double jeopardy) so seriously questioned as to result in an affirmance by an equally divided Court. (*Bartkus* v. *Illinois*, No. 39 Oct. Term 1957 Decided January 6, 1958.) Petitioner respectfully asserts that the "two sovereignties" rule is a cumulus of fallacies at least as applied to the matter of self-incrimination.

Prior to the decision of *Brown* v. *Walker*, the only case decided by this Court involving federal-state relationships in the field of self-incrimination was *United States* v. *Saline Bank*, 1 Pet. 100, wherein a discovery sought in a federal court was held to be barred as calling for facts criminating under Virginia penal laws.

Brown v. *Walker* involved an objection that an immunity statute was not sufficiently broad to discharge the rights

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[17] 161 U. S. 591.
[18] 199 U. S. 372.
[19] 201 U. S. 43.
[20] 284 U. S. 141.
[21] 322 U. S. 487.

of a witness under the Fifth Amendment in that it did not encompass an immunity against crimes against the State of Pennsylvania. The majority (per Brown, J.), did not hold such an immunity unnecessary, but instead held the statute sufficiently broad to bar state prosecution:

> "... The act in question contains no suggestion that it is to be applied only to the Federal Courts. It declares broadly that ... 'no person shall be prosecuted ... for or on account of any transaction matter or thing, concerning which he may testify'."

Any residual risk of prosecution outside the federal jurisdiction was described, quoting *Queen* v. *Boyes*,[22] as an

> "... extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."

and disposed of on the ground of remoteness. *Brown* v. *Walker* cannot properly be looked upon, therefore, as furnishing the root-stock for a "two sovereignties" doctrine.

Thus the rule stood until the 1905 term; the "two sovereignties" doctrine was no part of it. Proximity *vel* remoteness was the only consideration, the source of the peril, state or federal, was not a valid consideration. Then followed a series of three cryptic and, at least on the surface, mutually contradictory decisions, *Jack* v. *Kansas*,[23] *Ballman v. Fagin*[24] and *Hale* v. *Henkel*.[25]

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22 1 B. & S. 311; 21 Eng. Rep. 730.
23 199 U. S. 372.
24 200 U. S. 186.
25 201 U. S. 43.

Jack v. *Kansas* arose out of a state grand jury investigation into violations of its local anti-trust laws. The witness assailed the Kansas immunity statute as not affording protection against a Sherman Act prosecution. The Kansas courts, however, had held that inquiry into interstate transactions was not permissible and the record showed that the questions were, in fact, limited to local transactions. The majority, which included Holmes, said

> ". . . We do not believe that in such case there is any real danger of a federal prosecution, or that such evidence would be availed of by the Government for such purpose"

but followed up with the cryptic statement

> "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough."

Why, having found that the record would not support a claim of federal incrimination, the Court should make the latter comment is puzzling. Still more puzzling is the use made of the *Jack* case by Holmes in *Ballman* v. *Fagin*, discussed *post*. The *Jack* case is the only case to be entertained by this Court, prior to the case at bar, in which a claim of federal incrimination was asserted in a state court.

Ballman v. *Fagin*[26] was decided later in the same term.

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[26] 200 U. S. 186.

It held that a witness before a federal grand jury was protected in refusing to testify as to matters criminating under the bucket-shop statutes of Ohio; thus reasserting the *Saline Bank* rule. The opinion by Holmes cites *Jack* v. *Kansas* in support of the ruling, obviously interpreting that case as not supporting the "two sovereignties" doctrine.

Hale v. *Henkel* was argued at the same term. The major issue was the application of the privilege to corporations, but it was also contended that a corporate officer need not produce books and records before a federal grand jury when such evidence would tend to incriminate him under state law. The majority, without mentioning *Ballman* v. *Fagin*, disposed of the issue thusly:

> "The further suggestion that the statute offers no immunity from prosecution in the state courts was fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in Jack v. Kansas . . . namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held . . . that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer . . . The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty . . ."

The reference to *Brown* v. *Walker,* while literally true, is made to carry the implication that the Federal Government has no concern about the possibility of state prosecution whereas the case actually rested on the supremacy clause.[27] And while *Jack* v. *Kansas* is, in result, a converse holding, considered in the light of its citation in the *Ballman* case, it falls short of holding that the state is unconcerned about the possibility of federal incrimination. To these errors of implication, there is added a misunderstanding of the English rule.[28] Curiously, the dissenting Justices, Brewer and Fuller, were under the impression that the majority has held merely that

> ". . . the immunity granted by the Federal statute is sufficient protection against both the Nation and the several states."

The next step in the development of the "two sovereignties" doctrine was taken in *U. S.* v. *Murdock.*[29] This was an indictment for wilful failure to furnish income tax information, against which a special plea had been filed setting up an exposure to incrimination under the gambling and possibly the bribery laws of Illinois. This Court, sustaining a demurrer to the plea, said

> "The principle established is that full and complete immunity against prosecution by the govern-

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[27]An interpretation reaffirmed in *Ullman* v. *U. S.*, 350 U. S. 422.
[28]The quotation is based on *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, which was limited to its own peculiar facts by the decision in *United States* v. *McRae*, L. R. 3 Ch. App. 79 holding that an exposure to forfeiture by the law of the United States was a good plea in bar to an English discovery proceeding.
[29]284 U. S. 141.

> ment compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

Incongruously, however, it also relied on the supremacy clause:

> "Investigations for federal purposes may not be prevented by matters depending upon state law. Const. art. 6 §2."

The case repeats the error of *Hale* v. *Henkel* respecting the English law.

In *Feldman* v. *United States*,[30] a mail fraud defendant was convicted in a Federal court upon evidence of a check "kiting" scheme given by him under compulsion of a state immunity provision in a New York statutory creditors proceeding. If the holding is limited to deciding that New York could not by its immunity statute, immobilize a federal prosecution or control the evidence therein there is little question of its soundness. But the majority opinion seems to hold state and nation to be as far apart as England and Sicily for testimonial purposes. It leans heavily on the

> ". . . settled principle of our Constitution . . . that these (ten) Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit."

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[30]322 U. S. 487.

ignoring the obvious limitation that insofar as these Amendments create Federal rights in individuals, they impose the negative duty on states to refrain from interfering with individuals in the exercise of those rights.

Lyon v. *Mutual etc. Ass'n.*, 305 U. S. 484;
United States v. *Cruikshank*, 92 U. S. 542.

It further employs the questionable implications of *Jack* v. *Kansas*, *Hale* v. *Henkel* and *Murdock*, and subordinates the supremacy and remoteness grounds on which *Brown* v. *Walker* rested to the illustrative reference to "other sovereignty" contained in the language.

It should be remarked that the *Feldman* case is not dispositive of the issue in the case at bar. Feldman had not taken the one remedy open to him — that of resisting in the New York courts the disclosure of facts constituting a federal crime against which the New York statute could not immunize him. In the sense that he had not properly resisted New York's questions, he was not compelled to answer. It is one thing to hold New York's immunity unavailing; it is quite another thing to hold that New York may compel the giving of evidence of federal crime.

It is respectfully submitted that the "two sovereignties" doctrine is error. It is error in that it is founded in part upon a concept of the common law rule which is a false concept. It is error in that it is founded upon a misemphasized interpretation of *Brown* v. *Walker*. It is error in that it is founded upon a tunnel-visioned construction of *Barron* v. *Baltimore*. It is error in that it ignores the nature of the right conferred by the Fifth Amendment. It is error in that

it ignores the supremacy clause and its application in testimonial matters.

The true rule is not the "two sovereignties" rule but the rule of Federal supremacy, leaving to Congress and to the states the adjustment of such immunities as are necessary and expedient for the accomplishment of their proper social objectives, but respecting rights derived from the Federal Constitution to the extent that they are not displaced by proper immunities.

The right claimed by Petitioner here is a right deriving directly from the Fifth Amendment, the supreme law of the land. It is based on a primary right to avoid a federal prosecution springing from or furthered by his own compelled testimony. Ancillary to that primary right, is the right of silence, limited, of course, to the facts of federal import. As the primary right is federal, so the derivative right of silence is federal. As a federal right, the right of silence respecting federal crime is protected by the supremacy clause and the judges of New York are bound not to dishonor it.

The framers of the Ten Amendments, it may be conceded, were not writing a super-constitution for the states. But neither were they giving the citizen a shield against the acts of the federal government which could be stripped from him by the states in pursuit of their own ends. New York here seeks to strip this Petitioner of his shield against a federal prosecutor.

The Court will note that this argument in no wise questions the doctrine of *Twining* v. *New Jersey*[31] and *Adamson* v. *California*.[32] No general claim is made that the Fourteenth Amendment fastened upon the states the obligation to observe the restrictions of the Bill of Rights. If the questions here related solely to state-created offenses, as did the matters included in *Twining* and *Adamson*, Petitioner's position would be untenable, for his claim rests solely upon his rights vis-a-vis the Federal Government.

Nonetheless, there is a sense in which the Fourteenth Amendment is applicable here. Petitioner, not as a citizen of New York, but as a federal citizen, has a right of silence referrable to a federal prosecution. This would be a privilege or immunity of a citizen of the United States as such, which no state may abridge. The right is one of that limited class arising

> ". . . out of the nature and essential character of the federal government and granted or secured by the Constitution."[33]

Petitioner is in an anomalous and mystifying situation brought about by the divorce of law from realism and its casual flirtation with mere words. He stands between two governments each solemnly chanting that it is evil to convict upon extorted testimony while one seeks to extort and the other stands ready to use the extorted testimony to convict. Well might he say, 'Thou hypocrites!'."

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[31] 211 U. S. 78.
[32] 332 U. S. 46.
[33] *Duncan* v. *Missouri*, 152 U. S. 382; *Slaughterhouse* Cases 16 Wall. 36

CONCLUSION

For the foregoing reasons, we respectfully submit this petition for writ of certiorari should be granted.

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ADDENDA

SUPREME COURT OF LOUISIANA

New Orleans

BY McCALEB, J.: March 3, 1958

State of Louisiana

v.

Henry J. Mills

and No. 43,939

State of Louisiana

v.

Osmond J. Litolff

In re: Henry J. Mills and Osmond J. Litolff applying for writs of certiorari, mandamus and prohibition

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Writs refused.

We find no error of law in the ruling complained of.

/s/ EHMcC
/s/ ALP
/s/ JBH
/s/ FWH
/s/ HAM

I respectfully dissent.
/s/ JDS